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In The Supreme Court of the United States

OCTOBER TERM, 1970

No. 118

OCALA STAR-BANNER COMPANY, et al.,

Petitioners,

vs.

LEONARD DAMRON,

Respondent.

On Writ of Certiorari To The District Court Of Appeal, First District, State of Florida

Certiorari Granted May 4, 1970

PETITIONERS' REPLY BRIEF

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November, 1970.

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As permitted by Supreme Court Rule 41.3, Petitioners file this brief in reply to brief of Respondent on the merits.

This Court granted certiorari on May 4, 1970, and the issue here is whether the so-called *New York Times* rule applies. Respondent has frankly summarized his position on page 8 of his brief:

> "The charging of a public official or candidate for public office with a libelous defamatory falsehood of

> a perjury indictment on a matter unrelated to the office held or sought is a private libel and does not abridge the freedom of speech or other freedoms protected by the First Amendment to the United States Constitution."

Respondent completely overlooks the fact that as stated in *Garrison v. Louisiana* (1964) 379 U.S. 64, at 76 and 77, the *New York Times* doctrine extends to "*private* reputation as well as public reputation", and "anything which might touch on an official's *fitness* for office is relevant".

How a "perjury indictment" could be unrelated to Respondent's fitness for public office, Respondent does not attempt to explain.

Respondent also ignores that it was he who injected the public figure element of damage into the case.

Not only did the Trial Court refuse to strike Respondent's claims in his complaint for damage to Respondent in his capacity as Mayor and candidate for Tax Assessor, but as pointed out by the opinion of the District Court of Appeal, "a *directed verdict* on the question of liability was granted and the case went to the jury on damages only". (A. 19) Petitioner's evidence concerned almost entirely the alleged loss of the elections because of the article. No malice was alleged or proved.

The principal purpose of this reply brief is to answer some of the statements made by Respondent and to further emphasize our position that not only should the decision of the Florida Court be reversed but that a judgment should be entered up for Petitioners.

JUDGMENT SHOULD BE ENTERED FOR PETITIONERS

There is nothing in the record here which would support a judgment for the Respondent. Judgment should be directed to be entered for the Petitioners.

Far from the record showing "with convincing clarity" that the alleged libel was published "with knowledge that it was false or with reckless disregard of whether it was false or not" (*New York Times vs. Sullivan* (1964) 376 U.S. 254, at 280), the record here clearly shows that at most there was carelessness or negligence. There was no "intent to harm through falsehood", but merely a human error.

Pages 4, 5, 8 and 9 of his brief, where Respondent discusses the evidence, clearly reveal that it was Area Reporter Lucy Ware who had been in the past "improperly reporting events relating to Respondent". But Mrs. Ware did not make the error complained of here. She called in the correct name, "James Damron", as being the person indicted. It was the new man, the new Area Editor, Fred Meier, who had been on the job about a month, who *confused* the names. Meier used in the story the name of the public figure, Leonard Damron, rather than that of his brother, James Damron. Respondent recites no evidence charging Meier with anything other than carelessness or negligence. Meier had not even met Respondent at the time of the story.

There is just no evidence of "express malice" sufficient to take this case to the jury, let alone support a judgment against the newspaper.

And it must be continuously borne in mind that the case was not even submitted to the jury on liability. A verdict was directed for the Respondent on liability. The only ques-

tion that went to the jury was "how much" money he was to receive.

Incidentally, Gainesville, where Judge Harrold Carswell held Federal Court, was a considerable distance from the little town of Crystal River, where resided both the Respondent, Leonard Damron, and the Area Reporter, Mrs. Ware. There is nothing to show that Mrs. Ware got the information prior to the morning on which she telephoned the story to Area Editor Meier. In any event, Mrs. Ware did not make any error.

MINORITY OPINION

Perhaps Respondent's difficulty is compounded by his erroneous reliance, at pages 7, 11 and 12 of his brief, on the *minority* opinion in Curtis v. Butts (1967) 388 U.S. 130, at 155. He fails to recognize that the majority of this Court refused to go along with the reasoning he quotes and on which he relies.

NO BASIS FOR ANOTHER TRIAL

It is the position of the Petitioners that judgment should be entered up for Petitioners based on the record made at the trial. There is just no evidence of express malice within the Constitutional Rule to go to the jury. Petitioners should not be put to the trouble and expense of another trial.

When the *Beckley* case, infra, went back down, the Trial Court, which had originally ruled against the newspaper and let the case go to the jury, this time entered up summary judgment for the newspaper. This was affirmed by the Supreme Court of Appeals of West Virginia in Hanks v. Beck-

ley (1970) 172 S.E.2d. 816. Both the Trial Court and the Supreme Court held, in the light of the decisions of this Court, that:

> "Nothing presented by the plaintiff created a genuine issue for jury consideration as to the existence of malice, and the defendant was entitled to a judgment as a matter of law."

See also *Beatty v. Ellings, et al.*, (Minn. 1969) 173 N.W.2d. 12, where the doctrine was applied to *private citizen* "plaintiff, a resident of Winona, who has been an active opponent of these public (housing) programs, perhaps in part because he is, as his complaint discloses, the owner of an affected building". The Court reversed the lower Court for *not* granting summary judgment against the plaintiff, who had been called by public officials at public meetings "a son of a bitch", "a liar", and who had been told "you ought to see a psychiatrist". The Minnesota Supreme Court said that there was no evidence "of actual malice" within the *New York Times* rule. The Court, after citing *New York Times, Associated Press*, and *St. Amant*, said:

> "Plaintiff generally alleged that the defamatory words were 'maliciously' spoken, but there is not a sufficient pleading of constitutional malice. More importantly, there was *no evidence of such actual malice.* The trial court in denying defendant's motion for summary judgment stated that 'a possible question of privilege would be for the jury'. But the *question of privilege exists as a matter of law*".

The Fifth Circuit in *Dacey v. Florida Bar, et al.*, (C.A. Fla., July, 1970) 427 F.2d. 1292, directed that summary judgment be entered in favor of defendant Anderson. The court held

that libel plaintiff *author* Dacey was *not* a public officer or candidate but that he *was* a public figure. The court applied this standard:

> "His (Anderson's) statement that Dacey was convicted was *literally false* but his article was true in stating that an action had been brought against Dacey for the unauthorized practice of law. *Even assuming reportorial negligence, this does not meet the definition of actual malice in Sullivan.*"

We have cited in our principal brief numerous libel cases where judgment was entered up for the defendant newspapers as a matter of law, e.g., *Merritt-Chapman & Scott Corp. v. Associated Press, et al.* (Fla. CC, 1970) 33 Fla.Supp. 102, and cases cited therein, as well as in our Brief.

Respondent alleged punitive damages (A. 8) and vigorously attempted to show malice. Respondent was permitted to introduce everything he had on malice. Notwithstanding, the jury brought in *no* verdict for punitive damages but one for "actual" damages only (A. 14). These latter damages cannot stand because despite all of Respondent's efforts, he failed to show with anything even faintly resembling "convincing clarity", publication "with intent to harm through falsehood". After all of this, there is no justification for putting Petitioners through another trial. Respondent's own case shows a complete lack of *New York Times* "express malice".

PRIOR ARTICLES NOT ADMISSIBLE ON MALICE

Respondent's position seems to be that the earlier stories written by Mrs. Ware, and read to the jury, on some theory were sufficient to show constitutional "malice" (assuming this question had been submitted to the jury, which it had not).

On page 28 of our main brief, we point out that even if Meier, the man who made the error here and is charged with the "malice", had written these prior articles, which he did *not*, they were so innocuous that they could not possibly be the basis for the finding of "express malice".

But over and beyond that, it is our position that evidence of *prior* ill will, which does not have the slightest tendency to prove knowledge of falsity at the *time* of the instant story, must be excluded if debate on public issues is to remain "uninhibited, robust, and wide open".

This Court has repeatedly held that an intent to harm (ill will) is completely different from an intent to harm *through falsehood*. This Court has reversed for failure to recognize the distinction. See *Garrison*, supra; *Henry v. Collins* (1964) 380 U.S. 356, at 357; *Beckley v. Hanks* (1967) 389 U.S. 81; and *Greenbelt*, infra.

If prior articles were admissible to show ill will under the *New York Times* rule, then a newspaper could speak out with comparative freedom about some one unknown to it and to the public. But the same newspaper would not dare to say anything about a controversial public figure about whom it had written prior articles, who had a bad reputation, and against whom the publisher might be accused of having hatred or ill will.

As this Court stated as recently as *Greenbelt v. Bresler* (May 18, 1970) ..... U.S. ....., 26 L.Ed.2d 6, a judgment under the New York Times rule cannot be based on a "combination of falsehood and general hostility". If a jury is ever permitted to get into this question of general hostility, then no newspaper can take the risk of trying to get the facts before the public. We quote from *Greenbelt*, 26 L.Ed.2d. 6, at pages 12 and 13:

"The judge then defined *'malice' to include 'spite, hostility, or deliberate intention to harm'*. Moreover, he instructed the jury that 'malice' could be found from the 'language' of the publication itself. *Thus the jury was permitted to find liability merely on the basis of a combination of falsehood and general hostility.*

This was error of constitutional magnitude, as our decisions have made clear. 'This definition of malice is constitutionally insufficient where *discussion of public affairs* is concerned; "(w)e held in New York Times that a public official might be allowed the civil remedy only if he establishes that the utterance was false and that it was made *with knowledge of its falsity or in reckless disregard of whether it was false or true*"'. Rosenblatt v. Baer, supra, at 84, 15 L.Ed.2d. at 604. 'Even where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood. *Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred . . . .*' Garrison v. Louisiana, 379 U.S. 64, 73, 13 L.Ed.2d. 125, 132, 85 S.Ct. 209. See also Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82, 19 L.Ed.2d. 248, 250, 88 S.Ct. 197. And the constitutional prohibition in this respect is no different whether the plaintiff be considered a 'public official' or a 'public figure'. Curtis Publishing Co. v. Butts, supra."[1]

Note 1:

When the mandate of this Court in *Greenbelt* went down to the Court of Appeals of Maryland, that Court on July 7, 1970, vacated its prior mandate affirming plaintiff's judgment in the Maryland Circuit Court, ordered that the judgment obtained by plaintiff be reversed, and taxed costs against the plaintiff. Counsel advise us that inasmuch as the Maryland Court reversed without specifically remanding the case in accordance with its rules, the case is terminated.

As previously pointed out in *Garrison*, supra, at pages 73 and 74:

> "Under a rule like the Louisiana rule, permitting a finding of malice based on an intent to inflict harm, *rather than an intent to inflict harm through falsehood*, it becomes a hazardous matter to speak out against a popular politician, with the result that the dishonest and incompetent will be shielded . . . . . in the case of charges against a popular political figure, it may be almost impossible to show freedom from ill will or selfish political motives."

And, concluding at page 79:

> "**** *defeasance of the privilege is conditioned, not* on mere negligence, but on reckless disregard for the truth. Reversed."

The newspaper will be "convicted" by the jury, not on the basis that it knew the story was false or that it had a "high degree of awareness of probable falsity" – but on the basis of its general hostility to, or hatred of, the plaintiff, as showing "malice".

No amount of ill will can change truth to falsity or falsity to truth. But if the jury be permitted to take prior ill will or hatred or prior articles into account in determining constitutional "malice", a verdict for the plaintiff is almost assured. The jury will get away from knowledge of falsity, per se, and assume it to exist because of hatred or ill will. No amount of instruction or charge from the Court will change this factor.

Especially is this true if, in the privacy of the jury room, the jury has, with the blessing of the Court, prior articles evidencing hatred or ill will. Inevitably, this will influence a finding of "malice".

CONCLUSION

Respondent sought publicity. He was a constant actor on the public stage. It was solely because of all his public activities and publicity that the new Area Editor knew *of* Respondent and used Respondent's name.

As our former President said:

"If you can't stand the heat, stay out of the kitchen!"

But Respondent made his own choice – to seek the public spotlight. He has made his own bed and must lie in it.

As made clear by Respondent's brief, Respondent specifically alleged and recovered damages accruing to him as Mayor of Crystal River and candidate for County Tax Assessor, for alleged loss of elections growing out of a newspaper story. Respondent cannot now disavow his own self affixed public figure label.

The Trial Court directed a verdict for Respondent on liability with no proof of Constitutional "malice". The only question put to the jury was the amount of the damages.

Based on Respondent's own pleadings, evidence and arguments, the judgment below should be reversed and the lower court directed to enter judgment for Petitioners.

Respectfully submitted,

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